

HB33CAMP

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 HENRY CAMPBELL, et al.,

4 Plaintiffs,

5 v.

16 CV 8719 (AJN)

6 CITY OF NEW YORK,

7 Defendant.

8 -----x
9 New York, N.Y.
10 November 3, 2017
11 2:15 p.m.

12 Before:

13 HON. ALISON J. NATHAN,

14 District Judge

15 APPEARANCES

16 WOODLEY & MCGILLIVARY, LLP
17 Attorneys for Plaintiffs

18 BY: DAVID W. RICKSECKER
19 GREGORY K. McGILLIVARY
20 -and-

SPIVAK LIPTON, LLP
Attorneys for Plaintiffs
BY: HOPE A. PORDY

NEW YORK CITY LAW DEPARTMENT
Attorneys for Defendant
BY: KERRIN A. BOWERS

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2 THE DEPUTY CLERK: Case number 17 CV 8719. Campbell
3 v. the City of New York.

4 THE COURT: Good afternoon, everyone. I'll take
5 appearances of counsel starting with the plaintiffs.

6 MR. RICKSECKER: Yes. David Ricksecker with Woodley &
7 McGillivary.

8 THE COURT: Good afternoon.

9 MR. MCGILLIVARY: Greg McGillivary.

10 THE COURT: Good afternoon.

11 MS. PORDY: Hope Pordy, Spivak Lipton.

12 THE COURT: Good afternoon, Ms. Pordy. Thank you.
13 And for the city?

14 MS. BOWERS: Kerrin Bowers, Office of Corporation
15 Counsel, City of New York. Good afternoon, your Honor.

16 THE COURT: Good afternoon -- Ms. Bowers?

17 MS. BOWERS: Yes.

18 THE COURT: Thank you. Good afternoon, Ms. Bowers.
19 All right. We are here for our initial pretrial conference in
20 this FLSA matter following the motion practice. I am in
21 receipt of your joint letter and proposed case management plan,
22 and I thank you for those. I have some familiarity with the
23 case as a result of the motion practice. But if you would
24 situate me as you see fit any further for purposes of our
25 scheduling discussion, and in particular what's anticipated in

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1 terms of discovery. Obviously you're seeking an extended
2 schedule here. If you can talk about why that's necessary and
3 sufficient for what needs to be done, we'll finalize the case
4 management plan and I'll inquire as to how the Court can be of
5 assistance regarding settlement.

6 MR. RICKSECKER: Thank you, your Honor. In our case
7 management plan, the original dates we set forth were all kind
8 of tentative on the date of the notice going out and the
9 closing of that opt-in date.

10 As you saw this morning, we've agreed on the time for
11 that opt-in period to close. And so, I think we can actually
12 fill in some hard dates on some of the case management plan.
13 We had things like 60 days from that date or -- so if you want,
14 we could go through that and we can plug in actual dates for
15 some of those.

16 THE COURT: Well, what I'll ask is once we're done,
17 I'll ask you to submit just a revised version with the hard
18 dates, but talk me through your thinking for the periods that
19 you're seeking.

20 MR. RICKSECKER: Okay. So, what we envision is the
21 notice will go out next week. After 60 days, it will be
22 closed. The parties are in discussions on a stipulation to
23 limit discovery to narrow down the number of plaintiffs that
24 have to respond to written discovery and depositions.

25 THE COURT: What's the basic thinking in terms of the

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1 selection process?

2 MR. RICKSECKER: So the basic idea of the selection
3 process would be I believe 5 percent of the --

4 MS. BOWERS: Yes 5 percent.

5 MR. RICKSECKER: 5 percent of the employees in the
6 position. So, there's two positions at issue, peace officers
7 and sergeants. And there is a certain amount of geography to
8 make sure we have diversity of where they're working. That
9 would kind of -- that would be the underlying basis for this.
10 And then it would just be randomly selected from the plaintiffs
11 of who would be the discovery plaintiff. We will do that.
12 Again, we haven't finalized that stipulation, but typically,
13 we'll make that selection a few weeks after the close of the
14 opt-in period.

15 THE COURT: You said that's 60 days.

16 MR. RICKSECKER: Correct. 60 days from next
17 Wednesday, I believe. And at that point, the parties will
18 engage in the limited discovery with the exception of producing
19 all of the pay data and CityTime records for the entire
20 universe of plaintiffs.

21 THE COURT: Okay. Go ahead.

22 MR. RICKSECKER: That's kind of, at this point for our
23 discovery plan, that's kind of what we envisioned going
24 forward.

25 THE COURT: Okay. So that would put us at the close

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1 of discovery approximately when?

2 MR. RICKSECKER: That would I believe put discovery
3 closing in August of 2018. August 8 of 2018.

4 MS. BOWERS: I believe eight months is September. If
5 that's -- oh. I'm sorry. Yes.

6 MR. RICKSECKER: September?

7 THE COURT: We're talking eight months from two months
8 from now. So 10 months from now.

9 MR. RICKSECKER: That's right, I'm sorry.

10 THE COURT: It is November. All right.

11 Is there an estimate as to the size, in other words,
12 5 percent will represent approximately how many people?

13 MR. RICKSECKER: As this is an opt-in we can't be
14 100 percent as to how many will opt-in to participate. The
15 universe we're looking at is 1200 approximately. And so, you
16 know, it could vary, probably 50 percent or something along
17 that line. So 630 discovery plaintiffs, somewhere around there
18 is what I would anticipate.

19 THE COURT: All right.

20 MR. RICKSECKER: One additional matter I just wanted
21 to raise with the Court is the city and the plaintiffs, the
22 city has responded to some of our discovery requests and
23 produced pay data, and it is the FISA pay data as well as
24 CityTime records for 288 of the 295 plaintiffs that have opted
25 in at this point.

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1 And in our review of that data, we got it two weeks
2 ago, we've been able to determine with precision some of the
3 violations of the other claims that were addressed in the
4 motions practice. On the motion to dismiss regarding the
5 regular rate claims, the late payment, and the paying overtime
6 at the straight time rate. So the plaintiffs would like to
7 seek the opportunity to amend the complaint to include these
8 additional examples of the violations of the FLSA for those
9 three claims, for the plaintiffs.

10 THE COURT: I'll hear from Ms. Bowers on that point.
11 Anything further from the plaintiffs' side?

12 MR. RICKSECKER: No, I believe that is it for now.

13 THE COURT: Ms. Bowers, if you'll address the
14 amendment question and then generally the schedule.

15 MS. BOWERS: Thank you, your Honor. The city opposes
16 that request. There has been motion practice already, as your
17 Honor is aware, and plaintiffs were dismissed with prejudice
18 from those three additional claims. And I believe your Honor
19 addressed that pretty thoroughly in your decision to say that
20 the plaintiffs did not seek at that time to amend the
21 complaint. There has been no amendment in this case. And the
22 fact --

23 THE COURT: That was in the face of your opposition.

24 MS. BOWERS: Yes.

25 THE COURT: Given an expressed opportunity to amend in

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1 light of it.

2 MS. BOWERS: Yes.

3 THE COURT: So his contention is but you have now
4 turned over discovery which gives us new information that we
5 didn't have a good-faith basis for making before, I guess.

6 MS. BOWERS: Well, I understand, your Honor. But at
7 that point, you know, because we turned over data, you know --
8 there could have been -- it could have been asking other people
9 in the class at that point or other potential plaintiffs as to
10 allegations specific to certain weeks or times for these other
11 allegations. The fact we turned over data that would now open
12 the door to allow them to amend, given we were proceeding in
13 this case and now we have a collective as to Count One, and to
14 keep amending and adding in more plaintiffs now for Counts Two
15 through Four, is, I mean, I think they've had their opportunity
16 to do that.

17 THE COURT: What do you say to that?

18 MR. RICKSECKER: Your Honor, this is data that is not
19 easily accessible to the plaintiffs. And I can refer you to a
20 similar case, involving the same agency, where we, the
21 plaintiffs, sought to amend based on data produced by the city,
22 on these three same claims. And that's the Murray v. City of
23 New York case with Judge Castel.

24 THE COURT: And there, the judge had previously
25 dismissed with prejudice following an expressed opportunity to

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1 amend in face of the motion to dismiss arguments.

2 MR. RICKSECKER: It was -- it was not with prejudice,
3 and it also, we had actually had a previous amended complaint
4 in that case before the motion to dismiss.

5 THE COURT: I mean, I think at some point the
6 pleadings need to sit still. You had a full opportunity to
7 make allegations, so I'm disinclined to allow amendment at this
8 time.

9 MR. RICKSECKER: I understand that, your Honor. And
10 if I may, the violations are systemic. For example, of the 288
11 individuals they did produce data for, there are 285 of those
12 individuals are regular rate violations. There is --

13 THE COURT: Why couldn't there be -- are you asking me
14 to reconsider my decision?

15 MR. RICKSECKER: No, your Honor. We're simply --

16 THE COURT: You're --

17 MR. RICKSECKER: In order to comply with your decision
18 for us not providing specific data, and we'll provide specific
19 data for all 288 plaintiffs that we have data for, examples of
20 this, to amend the complaint to show this is indeed systemic.
21 And to give your Honor comfort in our pleadings that they are
22 specifically pled and this is basically an effort to, you know,
23 respond to your ruling to provide more specific information.

24 THE COURT: The ruling was a dismissal with prejudice.

25 MR. RICKSECKER: We understand that, for a certain

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1 number of the named plaintiffs. There was three in one claim
2 and four in the other. There are some plaintiffs that did
3 plead with specificity that remain. So those claims still
4 remain, and we have found for the other plaintiffs that have
5 opted in, since the initial filing of the complaint, that they
6 additionally have these claims. So we would like to amend that
7 in order to incorporate those in this case.

8 THE COURT: You can bring a motion to amend. When
9 would you like to do that?

10 MR. RICKSECKER: We would be prepared to do it in the
11 next seven days.

12 THE COURT: One week. Opposition two weeks.

13 MS. BOWERS: Your Honor, I would ask for two weeks.

14 THE COURT: Fine. We're in vigorous agreement.

15 MR. RICKSECKER: Thank you, your Honor.

16 THE COURT: So one week for the motion, two weeks to
17 oppose, one week to reply. And I'll consider it. I mean, it
18 sounds like a back door motion to reconsider the dismissal with
19 prejudice, but I'll look at your arguments.

20 Ms. Bowers, anything further from the city's
21 perspective as to the schedule?

22 MS. BOWERS: No, your Honor. I think that was the
23 outstanding issue about amendment and joinder of parties
24 pursuant to what was remaining on our order. So it seems that
25 that motion might address that piece of it.

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1 THE COURT: Say that again?

2 MS. BOWERS: From the scheduling order --

3 THE COURT: The amendment question?

4 MS. BOWERS: Yes. So I think the motion practice
5 might address that.

6 THE COURT: Yes.

7 MS. BOWERS: Also, I just wanted to point out we
8 are -- as Mr. Ricksecker said, we are negotiating the terms of
9 the discovery stipulation that we will submit to your Honor.

10 THE COURT: What's the time frame? Maybe you said
11 that.

12 MS. BOWERS: I was going to speak with him today about
13 certain things, so hopefully --

14 THE COURT: Within a week?

15 MS. BOWERS: Yes.

16 THE COURT: I appreciate counsel working out what
17 sounds like a reasonable statistical sampling of plaintiffs for
18 purposes of reasonable and proportionate discovery, and I'll
19 look forward to your stipulation. I'll otherwise enter the --
20 well, you'll submit, if you would, by end of day Monday a
21 renewed case management plan that has the appropriate dates,
22 based on the time frames that you've agreed to. Okay?

23 MR. RICKSECKER: Yes, your Honor.

24 THE COURT: I'll enter that. You'll be on that
25 schedule. Obviously there are a lot of plaintiffs to deal

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1 with, but with the sample you're proposing certainly the length
2 of time following the close of the opt-in period should be
3 sufficient to do what you need to do. I believe in fair but
4 efficient schedules and sticking to them once they're imposed,
5 so do what you need to do sooner rather than later.

6 If during the course of discovery you have disputes
7 try to work them out and continue the meet and confer process
8 that you've been engaged in. If you can't resolve them, you
9 can come to me pursuant to my individual rules and I'll give
10 you quick resolution to keep the case moving forward. Barring
11 any exceptional circumstances, the schedule that we put in
12 place on Monday will be the schedule that controls the case.

13 With respect to settlement, what would be of
14 assistance?

15 MR. RICKSECKER: Your Honor, the plaintiffs would be
16 interested in engaging in settlement discussions either with
17 the magistrate or the mediation process once notice is complete
18 for the opt-in plaintiffs and we've had an opportunity to
19 receive their data in order to review that. So we would be
20 amenable to that.

21 THE COURT: So, how about I hear -- that's in two
22 months' time, so how about in three months' time I hear from
23 you whether you would like the referral to the magistrate judge
24 at that time or the mediation program?

25 MR. RICKSECKER: Maybe --

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1 THE COURT: Four months?

2 MR. RICKSECKER: That would be better.

3 THE COURT: Ms. Bowers?

4 MS. BOWERS: Your Honor, as we have stated in our
5 letter to you, there are currently other actions pending and we
6 have found that it is most effective to explore settlement
7 after discovery and depositions in these cases, on the city's
8 part. We're not foreclosed to settlement. But we find there
9 might be a more productive time to do it.

10 THE COURT: How about we evaluate in four months.

11 I'll hear from you, and if the answer is we're not ready yet,
12 that's the answer, but it gives me a way of checking in on
13 whether the Court can be of assistance.

14 MS. BOWERS: Thank you.

15 THE COURT: I'll hear from you in four months on that.
16 Counsel, anything else I can address at this time?

17 MR. RICKSECKER: Not at this time, your Honor.

18 MS. BOWERS: Nothing further, thank you.

19 THE COURT: Thank you. Have a nice weekend.

20 (Adjourned)